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14           **UNITED STATES DISTRICT COURT**  
15           **DISTRICT OF NEVADA**

16           CHINA ENERGY CORPORATION, a Nevada corporation,

17           CASE NO. 3:13-cv-00562-MMD-VPC

18           Plaintiff,

19           vs.

20           ALAN T. HILL, ELENA SAMMONS,  
21           MICHAEL SAMMONS, THOMAS S.  
22           VREDEVOOGD, TRUSTEE OF THE  
23           KIMBERLY J. VREDEVOOGD TRUST UA  
24           1007/2008, JUN HE, and RANDY DOCK  
25           FLOYD,

26           Defendants.

27           **PLAINTIFF CHINA ENERGY CORPORATION'S MOTION TO MODIFY THE**  
28           **DISCOVERY PLAN AND SCHEDULING ORDER**

29           PLAINTIFF CHINA ENERGY CORPORATION ("CEC"), by and through its attorneys  
30           at the law firms of GORDON SILVER and ULMER & BERNE LLP, hereby moves for an order  
31           modifying the discovery plan and scheduling order, as amended by the Court's February 4, 2014,

1 Minute Order (Dkt. No. 134). This Motion is made pursuant to Federal Rule of Civil Procedure  
 2 16(b)(4). This Motion is supported by the following memorandum of points and authorities, all  
 3 pleadings and papers on file herein, and any other materials this Court may choose to consider.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 CEC is seeking to modify the Discovery Plan and Scheduling Order (Dkt. No. 86), as  
 7 amended by the Court's February 4, 2014, Minute Order (Dkt. No. 134), to conduct discovery in  
 8 two phases. First, all discovery, with the exception of expert disclosures and discovery, will  
 9 occur in accordance with the current discovery schedule. Second, in the event the Court  
 10 determines that any defendant is entitled to a fair value determination, the parties shall have sixty  
 11 (60) days in which to disclose experts and conduct expert discovery. CEC is seeking to modify  
 12 the scheduling order out of a desire to economize, expedite, and simplify the issues in this case.

13 In accordance with the Court's suggestion at the last settlement conference (Dkt. No.  
 14 134), prior to filing this Motion, CEC requested that all parties agree to bifurcate the various  
 15 claims for relief in this case. (Decl. of J. Bustos ¶ 3, **Exhibit 1**; Feb. 26, 2014, Letter, **Exhibit 2**.)  
 16 Mr. Sammons rejected CEC's proposal to bifurcate the claims, but offered to agree to modify the  
 17 scheduling order to conduct expert discovery following the Court's determination that any  
 18 Defendant is entitled to an appraisal of his or her shares. (Feb. 27, 2014, 6:21 a.m. Email,  
 19 **Exhibit 3**.) CEC and Mr. Sammons ultimately agreed to resolve the dispute in the manner Mr.  
 20 Sammons suggested, which is the proposal set forth in this motion. *See* (Feb. 27, 2014, 11:28  
 21 a.m. Email, **Exhibit 4**.) This proposal has also been agreed to by Defendants Dr. Sammons, Alan  
 22 Hill, and Jun He. *Id.*; (Feb. 27, 2014, Email from A. Hill, **Exhibit 5**; Feb. 27, 2014, Email from  
 23 J. He, **Exhibit 6**.)

24 Cede & Co., the Depository Trust Company, and COR Clearing (collectively, the "Third  
 25 Party Defendants") informed the undersigned that they need additional time to evaluate CEC's  
 26 proposal in light of the fact they have only recently become parties to this case. *Id.* ¶ 7. Similarly,  
 27 Mr. Vredevoogd indicated that he needed more time to evaluate the proposal. *Id.* ¶ 8. CEC did  
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1 not receive a response from Defendant Randy Dock Floyd. (Decl. of J. Bustos ¶ 9, **Exhibit 1.**)

2 **II. FACTUAL AND PROCEDURAL BACKGROUND**

3 On September 27, 2013, CEC filed its Complaint in the First Judicial District Court of the  
 4 State of Nevada, in and for the County of Carson City. (Ex. 1 to the Opp'n to Mot. for Partial  
 5 Summ. J. (Dkt. No. 36).) The action was subsequently removed to this Court on October 8, 2013.  
 6 (Notice of Removal (Dkt. No. 2).)

7 CEC's Complaint contains two alternative claims for relief. CEC's first claim for relief  
 8 seeks declaratory relief regarding whether any defendant complied with NRS 92A.440. (Compl.  
 9 ¶¶ 25-41, Ex. 1 to the Opp'n to Mot. for Partial Summ. J. (Dkt. No. 36).) Alternatively, CEC's  
 10 second claim seeks a fair value determination only “[i]n the event the Court finds that one or  
 11 more defendants complied with Chapter 92A.” *Id.* ¶ 43.

12 On January 22, 2014, the Court entered an Order (Dkt. No. 115) granting Defendants  
 13 Michael and Elena Sammons' unopposed Motion for Leave to File Third Party Complaint.  
 14 Michael Sammons and Elena Sammons filed their original Third Party Complaint (Dkt. No. 116)  
 15 against the Third Party Defendants on January 22, 2014. A First Amended Third Party  
 16 Complaint was subsequently filed on January 29, 2014. (First Am. Third Party Compl. (Dkt. No.  
 17 128).) It alleges that any failure to perfect Michael and Elena Sammons' dissenter's rights was  
 18 caused by the error(s) of the Third-Party Defendants. *Id.* ¶ 42.

19 In light of the nature of CEC's claims and the Third-Party claims, CEC submits that  
 20 conducting discovery in two phases would serve to economize, expedite, and simplify the issues  
 21 in this case.

22 **III. LEGAL STANDARD**

23 Pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure, a scheduling order  
 24 “may be modified only for good cause and with the judge's consent.” Fed. R. Civ. P. 16(b)(4).  
 25 The good cause standard “primarily considers the diligence of the party seeking the amendment.”  
 26 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) (quoting *Johnson v.*  
 27 *Mammoth Recreations, Inc.*, 975 F.2d 604, 607–09 (9th Cir. 1992)). The district court has broad  
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1 discretion in supervising the pretrial phase of litigation. *Zivkovic v. S. California Edison Co.*, 302  
2 F.3d 1080, 1087 (9th Cir. 2002) (citing *Johnson*, 975 F.2d at 607).

3 **IV. DISCUSSION**

4 CEC requests that the Court modify the discovery plan and scheduling order to conduct  
5 discovery in two phases. Under this proposal, the first phase would require all discovery, with  
6 the exception of expert discovery, to proceed in accordance with the current discovery schedule.  
7 The second phase would consist of expert disclosures and expert discovery and would begin  
8 upon the Court's determination that any Defendant is entitled to an appraisal of his or her shares.

9 **A. Proposed Modified Discovery Plan And Scheduling Order**

10 CEC's respectfully requests that the Court modify the discovery plan and scheduling  
11 order to conduct discovery in two phases as follows:

12 **Discovery Phase I:**

13 In accordance with the February 4, 2014, Minute Order (Dkt. No. 134), fact discovery  
14 will proceed in accordance with the following deadlines:

15 Discovery cut-off:

16 Thursday, May 22, 2014

17 Deadline to amend pleadings/add parties:

18 Friday, February 21, 2014

19 Dispositive motions relating to CEC's First claim for relief:

20 Monday, June 23, 2014

21 **Discovery Phase II:**

22 Expert disclosures and discovery shall proceed on an expedited sixty (60) day schedule as  
23 follows:

24 Disclosure of expert reports:

25 Thirty (30) days following the Court's determination that any Defendant complied with  
26 NRS 92A.440.

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28 ///

1                   *Disclosure of rebuttal reports:*

2                   Fifteen (15) days following disclosure of initial expert reports.

3                   *Expert depositions:*

4                   Fifteen (15) days following the deadline to disclose rebuttal expert reports.

5                   **B. Good Cause Exists To Modify The Discovery Plan And Scheduling Order**

6                   Good cause exists to modify the scheduling order to conduct discovery in two phases. The various claims for relief in this case are dependent upon a determination of whether any defendant complied with NRS 92A.440. Thus, as this Court is aware, in the event CEC prevails with respect to its first claim for relief, no defendant is entitled to a fair value determination. NRS 92A.490. *Smith v. Kisorin USA, Inc.*, 254 P.3d 636, 641 n.3 (Nev. 2011).

7                   Similarly, the claims against the Third Party Defendant are premised on a finding that Michael and Elena Sammons did not comply with NRS 92A.440. Thus, any finding that Michael and Elena Sammons perfected their dissenter's rights and complied with NRS 92A.440 would be dispositive of the First Amended Third Party Complaint (in the event the claims do not get dismissed for the reasons outlined in the Third Party Defendants' motions to dismiss (Dkt. Nos. 152, 161)). (First Am. Third Party Compl. (Dkt. No. 128).)

8                   The determination of whether any defendant complied with NRS 92A.440 will be based on the fact discovery that occurs in this case. On the other hand, the determination of the fair value of CEC shares will be largely driven by expert opinion as to valuation. This expert testimony has no bearing on whether any defendant complied with NRS 92A.440. And in fact, a determination regarding compliance with NRS 92A.440 could render expert discovery as to valuation irrelevant.

9                   CEC submits that conducting discovery in two phases would further the interests of convenience by simplifying and economizing the final resolution of this dispute. By awaiting a determination as to CEC's first claim for relief, neither the parties nor the Court need concern themselves with complex issues surrounding valuation and foreign currency restrictions in China, which CEC contends impacts a final valuation determination. By separating issues

1 concerning valuation, the case becomes simplified and both the parties and the Court can focus  
2 on the relevant discrete issues surrounding liability and damages.

3 Furthermore, the expense associated with valuation experts is likely to be considerable.  
4 This motion is filed in an effort to avoid unnecessary expenses in the event it is ultimately  
5 determined no defendant has a right to a fair value determination.

6 **V. DISCUSSION**

7 In light of the above, CEC respectfully requests that the Court modify the discovery plan  
8 and scheduling order to conduct discovery in two phases as outlined above.

9 DATED this 28<sup>th</sup> day of February, 2014.

10 **GORDON SILVER**

11 /s/ Justin J. Bustos  
12 MICHAEL N. FEDER  
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25 *Attorneys for Plaintiff*

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**CERTIFICATE OF SERVICE**

The undersigned, an employee of Gordon Silver, hereby certifies that she served a copy of **PLAINTIFF CHINA ENERGY CORPORATION'S MOTION TO MODIFY THE DISCOVERY PLAN AND SCHEDULING ORDER** via CM/ECF on February 28<sup>th</sup> 2014, to the following individuals:

Richard L. Elmore, Esq.  
Holland & Hart  
5441 Kietzke Lane, 2<sup>nd</sup> Floor  
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*Attorney for Thomas S. Vredevoogd,  
Trustee of the Kimberly J. Vredevoogd Trust  
UA 1007/2008*

Michael Sammons  
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*Defendant in Proper Person*

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And by U.S. Mail, postage prepaid, to the following individuals:

Alan T. Hill  
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/s/ Cindy S. Grinstead  
An employee of GORDON SILVER